UNITED STATES OF AMERICA	)	PROSECUTION RESPONSE TO DEFENSE
	)	MOTION TO DISMISS (FOR FAILURE TO
v.	)	STATE AN OFFENSE WITHIN THE
	)	SUBJECT MATTER JURISDICTION OF A
SALIM AHMED HAMDAN	)	MILITARY COMMISSION AND CONTRARY
	)	TO THE RECOGNIZED LAWS OF WAR)
	)	
	)	
	)	October 15, 2004

1. Timeliness. This motion is being filed in a timely manner within the parameters established by the Presiding Officer.

2. Relief Sought. The Prosecution requests that the Defense Motion to Dismiss based on the failure to allege an offense be denied.

3. Overview. Military Commission Law, specifically Military Commission Instruction No.2, is declarative of existing law which recognizes the crime of conspiracy and criminal accountability pursuant to joining an enterprise of persons who shared a common criminal purpose.

There have been prior convictions of the offense of conspiracy to commit war crimes before United States Military Commissions. Conspiracy is recognized under international law as well as liability based upon joining an enterprise of persons who shared a common criminal purpose.

4. Facts. The Defense cites no sources for the facts asserted in their motion (sources required to be identified in accordance with Presiding Officer Memorandum 4-2). The Prosecution does not specifically agree with or stipulate to the facts contained in Defense Motion paragraph 4. We will work with the Defense and attempt to work out acceptable stipulations.

The Prosecution asserts the following facts:

a. As the United States Supreme Court succinctly stated in Hamdi v. Rumsfeld:

> On September 11, 2001, the al Qaida terrorist network used hijacked commercial airliners to attack prominent targets in the United States. Approximately 3,000 people were killed in those attacks. One week later, in response to these 'acts of treacherous violence,' Congress passed a resolution authorizing the President to 'use all necessary and appropriate force against those nations, organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.' Authorization for Use of Military Force ('the AUMF'), 115 Stat 224. Soon thereafter, the President ordered United Stated Armed Forces to Afghanistan, with a mission to subdue al Qaeda and quell the Taliban regime that was known to support it.

124 S. Ct. 2633 (2004) (plurality opinion)

b. Subsequent to the AUMF, the President issued his Military Order of November 13, 2001 ("Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism"). 66 Fed. Reg. 222 (November 16, 2001) In doing so, the President expressly relied on "the authority vested in me . . . as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the [AUMF] and sections 821 and 836 of title 10, United States Code."[1]

c. In his Order, the President found, *inter alia*, "To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order . . . to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals." Id. at Section 1(e). The President ordered, "Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed . . . ." Id. at Section 2(a). He directed the Secretary of Defense to "issue such orders and regulations . . . as may be necessary to carry out" this Order. Id.

d. Pursuant to this directive by the President, the Secretary of Defense on March 21, 2001, issued Department of Defense Military Commission Order (MCO) No. 1 establishing jurisdiction over persons (those subject to the President's Military Order and alleged to have committed an offense in a charge that has been referred to the Commission by the Appointing Authority) and over offenses (violations of the laws of war and all other offenses triable by military commission). *Id*., at para 3(A), 3(B). The Secretary directed the Department of Defense General Counsel to "issue such instructions consistent with the President's Military Order and this Order as the General Counsel deems necessary to facilitate the conduct of proceedings by such Commissions . . . ." Id., at para 8(A).

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[1] Sections 821 and 836 are, respectively, Articles 21 and 36 of the Uniform Code of Military Justice ("UCMJ"). These sections provide, in relevant part:

Art. 21. Jurisdiction of courts-martial not exclusive

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

Art. 36. President may prescribe rules

a. Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commission and other military tribunals . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

b. All rules and regulations made under this article shall be uniform insofar as practicable.

e. The General Counsel did so, issuing a series of Military Commission Instructions (MCIs), including MCI No. 2: Crimes and Elements for Trial by Military Commission.

f. On July 13, 2004, the Appointing Authority approved and referred a charge of conspiracy against the Accused.

g. The Accused was born in Yemen. In 1996 he left Yemen utilizing a fraudulent passport and attempted to travel to Tajikistan to engage in *jihad*. (Accused's FBI 302 from July 2002 (Attached)).

h. Unable to join up with the Tajikistan *jihad,* the Accused eventually went to a Jalalabad guesthouse where he agreed to have a personal meeting with Usama bin Laden. His goal in meeting with bin Laden was to join in *jihad* with bin Laden (Accused's FBI 302 and CITF Form 40 from July 2002 and May 2003 (Attached)).

i. Prior to meeting with Usama bin Laden, the Accused was aware of bin Laden's goal to "expel the infidels from the Arabian Peninsula." (Accused's CITF Form 40 from May 2003).

j. After brief stops at the Jihad Wal and Khaldan terrorist training camps, the Accused met personally with Usama bin Laden at bin Laden's compound in Qandahar, Afghanistan (AF). (Accused's FBI 302 from July 2002).

k. The Acccused agreed to live at the bin Laden compound and serve as a driver. (Accused's FBI 302 from July 2002).

l. After an eight-month observation period conducted by Saif al Adel, the head of al Qaida security, the Accused was picked to serve as bin Laden's personal driver and bodyguard. (Accused's CITF Form 40 from May 2003). The Accused continued to serve in this capacity (absent a few leaves of absence) until his capture in November of 2001. (Accused's CITF Form 40 from May 2003).

m. While serving as bin Laden's personal driver and bodyguard, the Accused pledged "conditional bayat" to bin Laden agreeing to provide full support of the "*jihad* against the Crusaders and Jews." (Accused's CITF Form 40 from May 2003).

n. While serving the al Qaida organization, the Accused transported weapons and ammunition provided by the Taliban to al Qaida compounds in Qandahar. (Accused's CITF Form 40 from May 2003).

o. While serving as Usama bin Laden's driver and bodyguard, the Accused trained on several occasions at the al Farouq terrorist training camp on the use of various weapons. (Accused's CITF Form 40 from May 2003).

p. The Accused was with Usama bin Laden and was one of the people responsible for his safe transport and overall safety during the time periods of the U.S. Embassy bombings in 1998 and the attacks of September 11th. (Accused's statements of July 2002 and May 2003).

q. The Accused attended many speeches and press conferences given by Usama bin Laden where bin Laden described the "war against America" and the duty of Muslims to fight Americans. (Accused's statement of May 2003).

r. The Accused had knowledge of Usama bin Laden's 1996 Declaration of War and the 1998 fatwa against America. With this knowledge, he continued to serve as Usama bin Laden's driver and bodyguard. (Accused's CITF Form 40 from May 2003).

s. The accused observed Mullah Bilal experimenting with explosives in Qandahar, AF in the months prior to the USS COLE attack. Bilal was an al Qaida member who worked for bin Laden. Bilal admitted to Hamdan that he was directly involved in the USS COLE attack. (Accused's FBI 302 of 6 August 2002 (Attached)).

t. The Accused viewed portions of the USS COLE al Qaida recruiting video and believed this video was produced by al Qaida to spread enthusiasm for the cause throughout the world. (Accused's Form 40 of May 2003).

u. The Accused was an al Qaida member and he experienced "uncontrollable enthusiasm" as a result of being with bin Laden. (Accused's statement of May 2003).

v. The Accused was present shortly after the attacks of September 11th when Usama bin Laden discussed these attacks with Khalid Sheikh Muhammad (Mukhtar). Bin Laden thanked God for the success of the operation and asked God to reward Mukhtar for his work and role in the September 11th operation. (Accused's Form 40 of May 2003).

5. Authorities

a. Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) (plurality opinion)
b. President's Military Order of November 13, 2001 ("Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism")
c. Military Commission Order No. 1
d. Military Commission Instruction No. 2
e. Ex parte Quirin, 317 U.S. 1
f. Johnson v. Eisentrager, 339 U.S. 763 (1950)
g. Colepaugh v. Looney, 235 F.2d 429 (10th Cir 1956)
h. Thomas Michael McDonnell, The Death Penalty—An Obstacle to the "War Against Terrorism"?, 37 Vand. J. Transnat'l L. 353 (2004)
i. Neal Kumar Katyal, Why it Makes Sense to Have Harsh Punishments for Conspiracy, Legal Aff., Apr. 2003
j. United States v. Townsend, 924 F.2d 1385, 1394 (7th Cir. 1991)
k. Iannelli v. United States, 420 U.S. 770 (1975)
l. Direct Sales Co. v. United States, 319 U.S. 703 (1943)
m. Manual for Courts-Martial
n. United States v. Recio, 537 U.S. 270 (2003)
o. Callahan v. United States, 364 U.S. 587 (1961)

p. Pinkerton v. United States, 328 U.S. 640 (1946)
q. United States v. Rivera-Santiago, 872 F.2d 1073 (1st Cir. 1989)
r. Carlson v. United States, 187 F.2d 366, 370 (10th Cir. 1951)
s. United States v. Hersh, 297 F.3d 1233 (11th Cir. 2002)
t. WAYNE R. LAFAVE, CRIMINAL LAW (4TH ED. West Group 2000)
u. Major Michael A. Newton, Continuum Crimes: Military Jurisdiction over Foreign Nationals who Commit International Crimes, 153 Mil. L. Rev. 1, 14-21 (1996)
v. U.S Army's Field Manual 27-10, The Law of Land Warfare, (18 July 1956)
w. H.R. Rep No. 104-698
x. 18 U.S.C. section 2411
y. H.R. Rep. No. 105-204
z. Prosecutor v. Tadic, Case no. IT-94-1-A (Appeals Chamber, July 15, 1999)
aa. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 279
bb. Richard P. Barrett and Laura E. Little, Lesson of the Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals, 88 Minn. L. Rev. 30 (2003)
cc. International Military Tribunal for the Far East, Apr. 26, 1946
dd. Jordan J. Paust, Addendum: Prosecution of Mr. Bin Laden et. al for Violations of International Law and Civil Lawsuits by Various Victims, ASIL Insights (Sept. 21, 2001)
ee. Statute of the International Tribunal for Yugoslavia
ff. Statute for the International Tribunal of Rwanda
gg. Convention on the Prevention and Punishment of the Crime of Genocide, Dec 9, 1948
hh. Prosecutor v. Musema, Case no. ICTR-96-13-T, January 27, 2000
ii. Presbyterian Church of Sudan v. Talisman Energy, 244 F. Supp. 2d 289 (S.D.N.Y. 2003)
jj. Prosecutor v. Mulitinovic et al., Case No. IT 99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003
kk. Prosecutor v. Furundzija, Case No. IT-95-17/1-A, Appeals Chamber, July 21, 2000
ll. Prosecutor v. Kovocka et al., Case No: IT-98-30/1, Judgment 2 November 2001
mm. Carol Rosenberg, Driver for bin Laden in Guantanamo Cell, Miami Herald, February 11, 2004
nn. Mudd v. Caldera, 134 F. Supp.2d 138 (D.D.C. 2001)

6. Law Supporting the Request for Relief Sought.

a. Military Commission Instruction No. 2 is a Valid, Binding Instruction.

Execution of the war against al Qaida and the Taliban is within the exclusive province of the President of the United States pursuant to his powers as Executive and Commander in Chief under Article II of the United States Constitution. Ex Parte Quirin, 317 U.S. 1, 26 (1942). "The Constitution confers on the President the 'executive Power', Art II, cl. 1, and imposes on him the duty to 'take Care that the Law be faithfully executed.' Art. II, 3. It makes him the Commander in Chief of the Army and Navy, Art. II, 2, cl. 1, and empowers him to appoint and commission officers of the United States. Art. II, 3, cl. 1.

The Congress, in passing the AUMF of 2001, expressly authorized the President to use "all necessary and appropriate force" against "nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001," and it is the President's duty to carry out this war. Public L. No. 107-40, 115 Stat. 224 (2001).

As a plurality of the Supreme Court just months ago held, "The capture and detention of lawful combatants and the capture, detention, *and trial* of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.'" Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2639 (2004) (plurality opinion), citing Ex parte Quirin, 317 U.S., at 28 (emphasis added). See also, Johnson v. Eisentrager, 339 U.S. 763, 771 (1950). Furthermore, Congress, in enacting Articles 21 and 36 of the Uniform Code of Military Justice, expressly recognized the President's authority to use and to prescribe rules regarding military commissions. Thus, the President's Military Order is a legitimate, recognized exercise of his Constitutional authority as Commander in Chief.

As commissions are recognized to be the Executive Branch's prerogative, it has been left to the Executive to determine appropriate guidelines for the conduct of military commissions. "[S]urely since Ex parte Quirin,. . . there can be no doubt of the constitutional and legislative power of the president, as Commander in Chief of the armed forces, to invoke the law of war by appropriate proclamation; to define within constitutional limitations the various offenses against the law of war; and to establish military commissions with jurisdiction to try all persons charged with defined violations." Colepaugh v. Looney, 235 F.2d 429 (10th Cir. 1956), cert. denied 352 U.S. 1014 (1957).

The Executive has issued his guidance with respect to the present military commissions in his Military Order. The Order directs that individuals subject to trial under the Order shall receive a "full and fair trial" and delegates the authority to promulgate further orders or regulations necessary to implement military commissions to the Secretary of Defense. PMO, Section 4(c)(2). The Secretary of Defense further delegated the authority to issue regulations and instructions to the Department of Defense General Counsel. Pursuant to DoD MCO No. 1, Section 7, The Appointing Authority shall, subject to approval of the General Counsel of the

Department of Defense if the Appointing Authority is not the Secretary of Defense, publish such further regulations consistent with the President's Military Order and this Order as are necessary or appropriate for the conduct of proceedings by Commissions under the President's Military Order. The General Counsel shall issue such instructions consistent with the President's military order and this Order as the General Counsel deems necessary to facilitate the conduct of proceedings by such Commissions, including those governing the establishment of Commission-related offices and performance evaluation and reporting relationships. It is pursuant to this authority that the Department of Defense General Counsel issued, among other instructions, MCI No. 2. This instruction is "declarative of existing law" Para. 3(A), MCI No. 2. and details a number of offenses that "derive from the law of armed conflict." Id.

The charge before this Commission involves a conspiracy or joining an enterprise of persons who shared a criminal purpose to commit several of the offenses delineated in MCI No. 2. The elements of this offense are delineated in Section 6(C)(6) of MCI No.2 and as discussed, such elements are declarative of existing law.

These elements include:

(1) Entering into an agreement with one or more persons to commit a substantive offense triable by Military Commission or otherwise joining an enterprise of persons who share a common criminal purpose, that involved, at least in part, the commission or intended commission of one or more substantive offenses triable by Military Commission;

(2) That the Accused knew of the unlawful purpose of the agreement or the common criminal purpose of the enterprise and joined it willfully; and

(3) One of the conspirators or enterprise members, during the existence of the agreement or enterprise, knowingly committed an overt act in order to accomplish some objective or purpose of the agreement or enterprise.

The al Qaida organization is an elaborate organization with a worldwide reach. The organization, led by Usama bin Laden, actively recruited individuals to come to Afghanistan to attend terrorist training camps. Those who excelled at these training camps were chosen to conduct martyr and other operations that actively targeted United States military personnel and civilians as well as military and civilian property. The organization relied upon a compartmented cell structure such that only those with a true need to know were privy to the exact details of these destructive missions. Regardless of the clandestine and secret details of the missions, the goals and desires of the organization were very public and well known. See Generally, Thomas Michael McDonnell, The Death Penalty—An Obstacle to the "War against Terrorism"?, 37 Vand. J. Transnat'l L. 353 (2004). Usama bin Laden's 1996 Declaration of War against the United States as well as the 1998 fatwa he joined in on calling for the killing of American military and civilians wherever found were well publicized (See Attached). Most importantly the Accused was familiar with these proclamations when he took a role in the al Qaida organization and agreed to be bin Laden's personal driver and bodyguard. He was, in fact, present when Usama bin Laden announced the 1998 fatwa.

Based on the Accused's agreement to assist the al Qaida organization and his knowledge of one of the organization's purposes – to kill Americans, he can be found guilty of the crime of conspiracy if the prosecution can prove that one of the alleged overt acts was committed in furtherance of this conspiracy.

Use of conspiracy law is extremely appropriate in the prosecution of the Accused because, "in a world full of crime committed by groups, from terrorists to bank robbers, to drug gangs to mafia families, traditional conspiracy doctrine plays a vital role in making our society and communities safer." Neal Kumar Katyal, Why it Makes Sense to Have Harsh Punishments for Conspiracy, Legal Aff., Apr. 2003, at 44 (advocating use of conspiracy prosecutions as necessary weapon against group activity and as a means to compel cooperation of minor actors); Thomas Michael McDonnell, The Death Penalty—An Obstacle to the "War against Terrorism"?, 37 Vand. J. Transnat'l L. 353, 364-65 (2004) (use of conspiracy law by federal and military tribunal prosecutors essential to combating sophisticated terrorist groups like al Qaida); United States v. Townsend, 924 F.2d 1385, 1394 (7th Cir. 1991) (joint action of group more threatening than individual actions and collaboration allows for division of labor and psychological support).

b. The Basics of Conspiracy Law and the "Agreement".

Conspiracy is an inchoate offense, the essence of which is the agreement to commit an unlawful act. Iannelli v. United States, 420 U.S. 770, 777 (1975). The agreement need not be explicit and can be inferred from the facts and circumstances of the case. Direct Sales Co. v. United States, 319 U.S. 703, 711-713 (1943). "The agreement or common criminal purpose in a conspiracy need not be in any particular form or manifested in any formal words." MCI No. 2 Section (6)(C)(6)(b)(1); Manual for Courts-Martial (MCM), United States (2002 Edition), Section 5(c)(2) (sufficient if minds of parties arrive at a common understanding and this may be shown by conduct of the parties). The agreement need not state the means by which the conspiracy is to be accomplished or what part each conspirator is to play. MCM, Section 5(c)(2). A conspiracy conviction will be upheld even if the substantive offense that the conspirators agreed to commit is never completed or attempted. United States v. Recio, 537 U.S. 270-275 (2003) (agreeing to commit crime is sufficient evil warranting punishment whether or not substantive crime ever ensues); Iannelli 420 U.S. at 778. It is well established that when groups or partnerships are formed to commit criminal acts, the dangers are far greater.

> [C]ollective criminal agreement – partnership in crime—presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not

> confined to the substantive offense which is the immediate aim of the enterprise.

Callahan v. United States, 364 U.S. 587, 593-94 (1961).

Thus, paragraph 6(C) of MCI No. 2 is consistent with United States' domestic jurisprudence when it states "regardless of whether the substantive offense was completed, a person may be criminally liable of the separate offense of conspiracy." Furthermore Comment C(6)(b)(8) of MCI No. 2 is firmly established in the law when it states that "conspiracy to commit an offense is a separate and distinct offense from any offense committed pursuant to or in furtherance of the conspiracy." See Pinkerton v. United States, 328 U.S. 640 (1946).

Relationship with Your Co-Conspirators.

While a conspiracy does require two or more persons to enter into an agreement, the Prosecution is not required to establish that the Accused knew the identity of his co-conspirators and their particular connection with the criminal purpose. MCI No. 2 para 6(C)(6)(b)(1); MCM , Section 5(c)(1).

A conspiracy is a continuum. Once a participant knowingly helps initiate the agreement and set it in motion, he assumes conspirator's responsibility for the foreseeable actions of his confederates within the scope of the conspiratorial agreement, whether or not he is aware of precisely what steps they plan to take to accomplish the agreed goals." United States v Rivera-Santiago 872 F.2d 1073, 1079 (1st Cir.1989). Absent some type of withdrawal defense by the accused, all of the overt acts taken by the accused or another co-conspirator, regardless of the date they were undertaken, and regardless of exactly when it may be that jurisdiction attached for the President to *charge* this conspiracy as a crime under the Laws of War, are relevant to show the accused's participation in the conspiracy. After all, "the overt acts merely manifest that the conspiracy is at work." Carlson v United States 187 F.2d 366, 370 (10th Cir. 1951).

Overt Acts.

There are several overt acts alleged on the Accused's charge sheet. While not required, all of these alleged overt acts are arguably tied to the actions of the Accused. See MCI No. 2, Section 6(C)(6)(b)(3) (overt act must be done by one or more of the conspirators, but not necessarily the accused); MCM, Section 5(c)(4)(a) (overt act must be done by one or more of the conspirators, but not necessarily the accused).

The Defense contends that the conspiracy charge against the Accused is insufficient because many of the overt acts pled occurred prior to September 11, 2001. Defense Motion at para 5(d)(3). The Defense appears to assert that an armed conflict had commenced as of September 11, 2001, a matter vigorously disputed by the Prosecution. Id. (Defense raising issue based on minimizing conduct occurring prior to 9-11 and quoting President Bush with respect to terrorists declaring war on September 11th).

For the purposes of litigating this motion, these Defense concessions alone make the litigation of this point moot. See United States v. Hersh, 297 F.3d 1233, 1244-46 (11th Cir. 2002) (requiring only a showing that **one** overt act occurred after the effective date of the criminal statute). The Defense motion is asking for the conspiracy charge to be dismissed. The overt acts on the charge sheet on their face are alleged to have occurred through the year 2001 (Prosecution concedes that they concluded with the Accused's capture in late November 2001). The Prosecution intends to prove that most, if not all, of these alleged overt acts occurred both before and after the terrorist attacks of September 11th. This factual issue as well as the factual issue related to the commencement date of the armed conflict will appropriately be resolved during the trial on the merits.

While not required for the resolution of this issue, it is the Prosecution's position that the crux of a conspiracy offense is the agreement. After the agreement, the offense is complete once an overt act is committed that will "effectuate the object of the conspiracy or in furtherance of the common criminal enterprise. MCI No. 2 para 6(C)(6)(b)(3). It is not essential that any substantive offense be committed. Id. at para 6(C)(6)(b)(4). Therefore it is irrelevant whether the ultimate crime is committed or whether a state of armed conflict existed at the time of the overt act. The purpose behind criminalizing conspiracies it to prevent crimes before they occur, while attacking against the dangers of group criminality. See WAYNE R. LAFAVE, CRIMINAL LAW (4th ed. West Group 2000) at 620.

c. U.S. Military Commissions have Previously Convicted of Conspiracy in Relation to Law of War Violations.

The Defense assertion that a charge of conspiracy is "unknown to the laws of war" is erroneous. Defense Motion at 1. The Defense relies on the Quirin case for the assertion that offenses against the laws of war can be tried before military commissions. See Defense Motion para 3; Ex parte Quirin, 317 U.S. 1 (1942). In Ex parte Quirin, several Nazi saboteurs were charged and tried before a military commission created by President Roosevelt in his capacity as President and Commander in Chief. Included in these charges was **conspiracy to commit the offenses of violation of the law of war**, violation of Article 81 of the Articles of War (giving intelligence to the enemy) and Article 82 of the Articles of War (spying). 317 U.S. 1 (1942). The exact wording of the conspiracy specification was:

> Specification: In that, during the year 1942, the prisoners, Ernest Peter Burger, George John Dasch, Herbert Haupt, Heinrich Harm Heinck, Edward John Kerling, Hermann Neubauer, Richard Quirin, and Werner Thiel, being enemies of the United States and acting for and on behalf of the German Reich, a belligerent enemy nation, did plot, plan, and conspire with each other, with the German Reich, and with other enemies of the United States, to commit each and every one of the above-enumerated charges and specifications."
>
> Quirin Trial Transcript at 43, 44.

Similarly, in Colepaugh v. Looney, the accused was tried before a military commission and convicted of conspiracy to commit law of war violations. 235 F.2d 429 (10th Cir. 1956). Relying on the Quirin decision, the court stated that there can be no doubt that the President, as Commander in Chief of the armed forces can invoke the law of war by appropriate proclamation and can define the various offenses against the law of war. Id. at 431-432. It is noteworthy that this opinion was issued in 1956 and there was no mention that the enactment of the UCMJ in 1950 would in any way curtail the President's powers in this regard.

While Quirin is one of the most well known military commission cases, war crime conspiracy convictions at military commissions did not commence with the Quirin decision. See Mudd v. Caldera, 134 F. Supp.2d 138 (D.D.C. 2001) (military commission had jurisdiction to try conspirator in the assassination of President Lincoln); Major Michael A. Newton, Continuum Crimes: Military Jurisdiction over Foreign Nationals who Commit International Crimes, 153 Mil. L. Rev. 1, 14-21 (1996) (providing historical context for military commissions and identifying other commission war crime conspiracy convictions from 1865 and 1942).

The Department of the Army formally recognized the offense of conspiracy to commit war crimes in 1956. U.S. Army's Field Manual 27-10, The Law of Land Warfare, Chapter 8, para. 500 (18 July 1956). It clearly and succinctly states that "Conspiracy, direct incitement, and attempts to commit, as well as complicity in the commission of, crimes against peace, crimes against humanity, and war crimes are punishable." Id. Based on this language alone, the *ex post facto* argument the Defense attempted to convey during *voir dire* is nullified.

The Defense has forcefully asserted that "conspiracy has never been used to prosecute an inchoate offense of the law of war. Defense Motion at 5(d) (1). There source for this proclamation is the book International Criminal Law by Cassesse. This source simply does not support this argument. Cassesse notes that Nuremburg had a restrictive view of conspiracy, but he does not assert that prosecutors have never charged anyone with conspiracy to commit an inchoate offense against the law of war. Id. at 197. In fact, this page in the textbook is part of a section discussing conspiracy to commit genocide. Id. In this realm, Cassesse acknowledges that the ICTR Trial Chamber has concluded that this prohibition applies to inchoate offenses and that in the Musema case, a conspiracy conviction was determined valid regardless of whether the ultimate substantive offense was ever committed. Id. at 198.

d. The Accused can be Tried for Any Act that Constitutes a Crime Under the Law of War or that by Statute can be Tried Before a Military Commission.

Article 21 of the Uniform Code of Military Justice (UCMJ) states that military commissions have jurisdiction to try "offenses that by statute or by the law of war may be tried by military commissions." A literal reading of this statute defeats the Defense argument that Commissions can only try the offenses of spying (UCMJ Article 106) and aiding the enemy (UCMJ Article 104). The word "or" clearly shows that this statute permits the prosecution of violations of the law of war **in addition** to the offenses that can be tried based upon offenses defined by statutes elsewhere. Therefore neither of these crimes specifically defined under the UCMJ nor the crimes defined in 18 U.S.C. 2411 preclude the prosecution of other violations of the law of war.

The UCMJ was enacted in 1950 and replaced its predecessor, the Articles of War. The Defense contends that because the offenses of aiding the enemy (Article 104) and spying (Article 106) were changed slightly when the UCMJ was enacted, Congress somehow was taking away the ability to prosecute other violations of the law of war. This assertion is incorrect. It is more important to examine Article 21 of the UCMJ when it was enacted in 1950. UCMJ Article 21 was not altered in any way from its predecessor, Article 15 of the Articles of War. In fact, this statutory language was left unchanged because this language had already been construed and interpreted favorably in Quirin. H.R. Rep No. 81-491 (specifically stating it was left unchanged because of Quirin); S. Rep. No. 81-486 (also confirming left intact because of Quirin). Clearly Congress did not intend to limit the prosecution of war crimes that were the subject of prosecution in Quirin.

The War Crimes Act was enacted for a specific purpose. When originally enacted in 1996, it was for the express purpose of satisfying the 1949 Geneva Conventions requirement of providing criminal penalties in a country's domestic courts for grave breaches of the Geneva Conventions. H.R. Rep. No. 104-698 (July 24, 1996). In the "Purpose and Summary" section of the House Report, it states that this legislation was to provide criminal penalties "for **certain** war crimes." Id. at 1. Congress clearly understood that there were **other** war crimes in existence that this legislation was not intended to address. This legislation was enacted because then current federal and state law was inadequate to support prosecutions of all grave breaches of the Geneva Conventions. Id. at 4.

It was understood when the War Crimes Act legislation was passed that the statute was inadequate to address many war crime situations. Id. at 8. Aware of these limitations, representatives from both the Department of State and Department of Defense submitted letters recommending that the statute be written more broadly. Id. at 8 n.27. Congress did not make the statute broader as requested but also expressed that these war criminals could be punished by **more appropriate alternative venues**. Id.

The War Crimes Act was amended in 1997. Included in the amendments was the extension of the statute to punish war crimes other than just grave breaches of the Geneva Conventions. 18 U.S.C. 2441(a). However the limitations concerning the "circumstances" when this statute could be utilized remained subject to the previous restrictions. 18 U.S.C. section 2441(b) (prosecution only available when person committing the crime or victim of crime is a member of U.S. armed forces or a national of the United States). Therefore, even with the amendments, many war crimes remained beyond the reach of this statute. The statute went on to define in more detail what constituted a "war crime" but with the qualifier "as used in this section." 18 U.S.C. section 2441(c) (defining war crime but only when prosecuted using this statute that only permits prosecution when perpetrator or victim is U.S. national or servicemember). If this legislation is deemed to preclude military commission and other prosecutions, a multitude of victims will be left unprotected and a multitude of war crimes will be left unprosecutable. Under the Defense reasoning, a perpetrator of the September 11th attacks could not be prosecuted for the deaths of those who were not U.S. nationals or servicemembers.

The testimony of Michael J. Matheson, Principal Deputy Legal Advisor to the Department of State, was examined by the House Committee on the Judiciary in determining whether

amendments to War Crimes Act were necessary. H.R. Rep. No. 105-204 at 3 (July 25, 1997). Mr. Matheson asked for expansion of the statute to cover **certain** violations of the laws of war in addition to grave breaches. Id. The use of the qualifier "certain" clearly demonstrates that there are other acts that would violate the laws of war that this statute was not meant to address. Furthermore, this statute was obviously not meant to be exhaustive and the only avenue available to prosecute war crimes. It is certainly not what was contemplated in the Defense cited language for Quirin of "crystallizing in permanent form and in **minute detail every offense** against the law of war" (emphasis added).

There is some overlap between the crimes that could be prosecuted at a military commission and those that could be prosecuted in a federal district court. However Congress clearly realized that military commissions might overlap with other judicial systems. While not specifically mentioning federal district courts, Congress made it very clear that the availability of other forums was not to preclude Commission jurisdiction. See UCMJ Article 21 (delineating that courts-martial jurisdiction does not deprive a commission of concurrent jurisdiction).

e. Although Inapplicable – Conspiracy Prosecutions Are Acceptable Under the War Crimes Act.

The War Crimes Act lists a variety of offenses that constitute violations of 18 U.S.C. section 2441. While not conceding that this statute has any applicability with respect to Commission prosecutions, the Defense assertion that conspiracies related to the war crimes listed in 18 U.S.C. section 2441 are precluded from prosecution is incorrect. Defense Motion para 5(c). A conspiracy prosecution is available for any offense under Title 18 of the United States Code (that like 18 U.S.C. section 2441 does not have its own independent conspiracy language) under 18 U.S.C. section 371 (making punishable any offense where two or more persons conspire to commit an offense against the United States).

f. The Defense Argument that MCI No. 2 Does not Require an Agreement.

The Defense asserts that MCI No. 2 does not require the element of an "agreement." In defining the elements of conspiracy MCI No. 2 specifically states: "Entering into an agreement with one or more persons to commit a substantive offense triable by Military Commission or otherwise joining an enterprise of persons who share a common criminal purpose, that involved, at least in part, the commission or intended commission of one or more substantive offenses triable by Military Commission" MCI No. 2 para 6(C)(6)(a). The term "agree" is alleged on the charge sheet as the Prosecution contends the evidence will show both an agreement by the Accused as well as his joinder in an enterprise of persons who shared a common criminal purpose (although not required to prove both). The Defense may dispute that the Accused ever entered into an agreement. This is a question of fact to be determined during the trial on the merits. It is not an appropriate matter for a pretrial motion where the charge as drafted clearly states an offense under MCI No. 2.

As will be discussed below, criminal liability based on joinder in an enterprise of persons who shared a common criminal purpose is clearly established under customary international law. See Prosecutor v. Tadic, Case No. IT-94-1-A paras. 180-209 (ICTY Appeals Chamber, July 15,

1999) (J. Cassesse, Presiding). In analyzing this offense or form of liability, the Tadic Appeals Chamber found this doctrine rooted in the laws of the United States as well as the laws of other both common and civil law countries. Id. at para. 224. The Appeals Chamber found such principles to exist under the United States Supreme Court precedent citing to Pinkerton v. United States, 328 U.S. 640 (1946) (a conspiracy case where accused convicted of both conspiracy and the other foreseeable crimes committed that were likely to result from the common criminal purpose).

g. Conspiracy under International Law.

The crime of conspiracy was clearly established in the Nuremburg Charter. It defined crimes against peace to include "the planning, preparation, initiation, or waging of a war of aggression or a war in violation of international treaties, agreements or assurances, or participations in a **common plan or conspiracy** for the accomplishment of the foregoing" (emphasis added). Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 2, art. 6(a), 82 U.N.T.S. 279, 288, 59 Stat. 1544, 1547; Richard P. Barrett and Laura E. Little, Lesson of the Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals, 88 Minn. L. Rev. 30, 56 (2003) (citing Nuremburg and Tokyo trials as examples where conspiracy to commit crimes against peace were recognized in the charters as separate crimes); The Nuremburg Tribunal stated that Hitler had to have the cooperation of others in carrying out his plan. When these others, with knowledge of his [Hitler's] aims, gave him their cooperation, they made themselves parties to the plan he had initiated. See Nazi Conspiracy and Aggression, Opinion and Judgment Vol. 1, Office of the United States Chief of Counsel for Prosecution of Axis Criminality at 45. Similarly, Usama bin Laden relies on others to carry out his plan to attack and kill Americans whether military or civilian. Persons like the Accused, who provide cooperation and assistance to bin Laden with knowledge of bin Laden's plan, are exactly the criminals that conspiracy law is designed to reach.

Conspiracy law was solidified in Articles 5(a) and 5(b) of the International Military Tribunal for the Far East, Apr 26, 1946, 2, 4 Bevan 20, 28 punished "the planning, preparation, initiation or waging of a . . . war of aggression, or a war in violation of international law, treaties or agreements or assurances, or participation in a **common plan or conspiracy** for the accomplishment of any of the foregoing" and also directly assigned criminal responsibility to conspirators "for all acts performed by any person in the execution of such plan."

Seven individuals were in fact convicted of conspiracy offenses at Nuremburg. The Defense's assertion that a charge of conspiracy lacks validity based on a memo from an Assistant Attorney General that merely criticized the use of conspiracy charges is unwarranted and unjustified as these seven individuals at Nuremburg were in fact convicted and sentenced based upon their role in the conspiracy. This holding of the Nuremburg International Tribunal is reflective of customary international law. See also, Richard P. Barrett and Laura E. Little, Lesson of the Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals, 88 Minn. L. Rev. 30 n. 53 (examining International Tribunal at Nuremburg holding that person can be convicted of war crimes and crimes against humanity they are "connected with" even if not involved in or part of a prearrangement with the person who actually commits the crime).

Military tribunals in France and Great Britain continued to broaden conspiracy law as they conducted several military commissions where conspiracy or joint enterprise to commit war crimes was prosecuted. See Tadic, Case No. IT-94-1-A (ICTY Appeals Chamber, July 15, 1999) (discussing the war crimes conspiracy convictions in France, Great Britain, United States and other countries). Admittedly many of these cases discussed in Tadic rested their convictions on a joint enterprise theory of liability for the ultimate substantive offense. Based on the arguments presented, it is clear that theory of prosecution is directly akin to conspiracy and joint enterprise liability as defined under MCI No. 2. Tadic at paras. 206-213 citing The Essen Lynching Case *The Trial of Erich Heyer and Six Others*, British Military Court for the Trial of War Criminals Volume I, 88 (United Nations War Crimes Commission, 1947) and drawing the inference that all concerned in the killing" were guilty and citing the United States military court case of Kurt Goebel et al. placing great emphasis on the "common purpose" argument of the prosecutor who stated all the accused were "cogs in the wheel of common design, all equally important, each cog doing the part assigned to it."

Conspiracy law continued to develop and expand in International Law. Its existence is most prevalent in the Genocide Convention of 1948. In addition to establishing the crime of conspiring to commit genocide, it also mandated that members of the United Nations would ensure that conspiracy to commit genocide was a punishable offense in their domestic criminal codes. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 3(b), 78 U.N.T.S. 277, 280. The conspiracy crime is proscribed in various other international conventions. See Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, June 26, 1936, art 2(c) (as amended) (requiring signatory states to make legislation providing for the severe punishment of conspiracy to traffic drugs); United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, adopted Dec. 19, 1988, art. 3(1)(c)(iv), 29 I.L.M. 493; International Convention on the Suppression and Punishment of the Crime of Apartheid, U.N. Gaor, 28th Sess., 2185th plen. Mtg., Annex, Supp. No. 30 at 76, art III(a), U.N. Doc. A/9030 (1973) (providing for international criminal responsibility for those who "commit, participate in, directly incite or conspire in the commission of the acts [of apartheid]"); Richard P. Barrett and Laura E. Little, Lesson of the Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals, 88 Minn. L. Rev. 30 n.126 (2003) (extensive discussion of conspiracy recognized in various international conventions). Based upon this established history of conspiracy law in the international arena, *ex post facto* concerns are alleviated and do not stand as an obstacle to prosecution under international criminal law. Richard P. Barrett and Laura E. Little, Lesson of the Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals, 88 Minn. L. Rev. 30, 60-61 (2003); Jordan J. Paust, Addendum: Prosecution of Mr. Bin Laden et al. for Violations of International Law and Civil Lawsuits by Various Victims, ASIL Insights (Sept. 21, 2001) (identifying examples where *ex post facto* problems avoided because crimes already recognized under customary international law).

Conspiracy law has been recognized in the International Tribunals of Yugoslavia(ICTY) and Rwanda (ICTR). See Statute of the International Tribunal for Yugoslavia, art. 4(3)(b) (declaring that conspiracy to commit genocide is a punishable act); Statue for the International Tribunal for Rwanda, art. 2(3)(b); Amnesty International, The International Criminal Court: Making the Right Choices, pt. 1, VI(D) (1997) (stating that concept of "conspiracy" is recognized in the ICTY and ICTR statutes).

In Prosecutor v. Alfred Musema, the ICTR defined the crime of conspiracy to commit genocide established in the ICTR statute. Case No. ICTR-96-13-T, Trial Chamber, January 27, 2000 at para 185-198. Choosing a common law approach over a civil law approach, the Trial Chamber held that conspiracy is "an agreement between two or more persons." Id. This is consistent with the language of MCI No. 2. Most importantly, the Trial Chamber recognized conspiracy as a crime in and of itself and not just a theory of liability. Id.

In Presbyterian Church of Sudan v. Talisman Energy, there is a comprehensive discussion of the sources of customary international law and whether conspiracy to commit a war crime is an offense under these laws. 244 F. Supp. 2d 289 (S.D.N.Y 2003). This case arose under the Alien Tort Claims Act (ATCA) where the Talisman Corporation was sued for conspiring to commit war crimes and other offenses. Id. at 296. Based on the wording of the ATCA statute, the court had to analyze the validity of the allegations by applying customary international law. Id. at 304. The court held that "an examination of international law reveals that the concepts of **conspiracy** and aiding and abetting are commonplace with respect to the types of allegations contained in the Amended Complaint, such as genocide and **war crimes**" (emphasis added). Id. at 321. In making this determination, the court examined the precedent from the various international criminal tribunals. Id. at 322-324.

MCI No. 2 establishes criminal liability through either entering into an agreement with one or more persons to commit a substantive offense triable by Military Commission or *otherwise joining an enterprise of persons who share a common criminal purpose*. MCI No. 2 para 6(C)(6). This liability based upon "joining an enterprise" was established solidly in an in-depth opinion in the seminal case of Prosecutor v. Tadic, Case No. IT-94-1-A (ICTY Appeals Chamber, July 15, 1999). Tadic was convicted of murdering five people because he "took part in the common criminal purpose to rid [the Prijedor region] of the non-Serb population, by committing inhumane acts," and because the killing of non-Serbs in furtherance of this plan was a foreseeable outcome of which he was aware. Prosecutor v. Tadic, Case No. IT-94-1-T, paras 371-73 (ICTY Trial Chamber II, May 7, 1997), aff'd, Case No. IT-94-1-A (ICTY Appeals Chamber, July 15, 1999). There is a distinction between the Tadic decision and Section (6)(C)(6) of MCI No. 2. The Tadic court found liability for the ultimate substantive offenses because of sharing a common criminal purpose with others in the enterprise. Id. MCI No. 2 permits conviction of the enterprise offense in and of itself.

From a practical perspective this is a matter of little import. It appears that MCI No. 2 merely reflects the more traditional approach which practitioners before Military Commissions are accustomed to(as well as others in common law jurisdictions). Even under a traditional court-martial approach, a conspirator can be convicted of the underlying substantive offense solely because of his role in the analogous conspiracy. There is no prejudice to the Accused. See MCM, Section 5(c)(8); Pinkerton, 328 U.S. at 646.

The impact of the distinction is even more remote in the prosecution of this Accused as factually, the ultimate substantive offenses were carried out to completion. Prosecutor v. Mulitinovic et al., Case No. IT 99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, para. 23, 21 May 2003 (identifying

difference in that conspiracy only requires an agreement whereas joint criminal enterprise requires some criminal act in furtherance of the agreement). While there may be some differences, the underlying goal that is common to these offenses is the punishment of criminal thoughts when coupled with some action that advances the thought.

The Tadic Appeals Chamber delineated three categories of joint activity that could result in criminal liability for a person who joins a criminal enterprise. They are:

(1) where all co-defendants, acting pursuant to a common design possess the same criminal intention;

(2) where members of a unit act pursuant to a concerted plan, each with the requisite mental element deriving from "knowledge of the nature of the system . . . and intent to further the common design" (based on World War II concentration camp prosecutions of administrative and support staff);

(3) where the accused possesses "the intention to take part in a joint criminal enterprise and to further . . . the criminal purposes of that enterprise" and the offenses committed by members of the group are foreseeable.

Tadic, Appeals Chamber, July 15, 1999, paras. 196-220.

The scope of this third theory of liability under Tadic is far reaching. Under this approach, a participant in the enterprise who does not commit the ultimate substantive offense is still subject to prosecution if they have the requisite intent to further the enterprise's purposes and if he could have predicted or foreseen this ultimate result. Id. at para. 220.

Mr. Hamdan was aware of the Declaration of War against America in 1996 and the 1998 fatwa calling for the killing of Americans whether military or civilian. He knew that training camps were established in Afghanistan which at least in part trained individuals to conduct martyr missions in furtherance of these goals. He knew that all operational planning had to be approved by Usama bin Laden and that those carrying out these missions were accountable to bin Laden. The Accused was with bin Laden at the time of the American Embassy Bombings in 1998 and the attacks of September 11th. He knew that the United States would react to these attacks by seeking out Usama bin Laden and his dedicated followers. The Accused took direct action to ensure the safety of bin Laden, a person he had previously pledged conditional bayat to.

The ICTY continued to expand the enterprise liability case law established in Tadic in Prosecutor v. Furundzija, Case No. IT-95-17/1-A, Appeals Chamber, July 21, 2000. The Furundzija Appeals Chamber stated that a preexisting plan or purpose is not required for criminal liability to attach. Id. at para. 119. The "common plan or purpose may materialize extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise." Id.

Some have suggested that the ICTY's required proof of a "common plan" for criminal enterprise convictions is strikingly similar to the proof required for the "agreement" element in

establishing a conspiracy. Richard P. Barrett and Laura E. Little, Lessons of Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals, 88 Minn. L. Rev. at 42.

While not specifically mentioning the word "conspiracy", in the newly established International Criminal Court (ICC), a person can be held criminally responsible if they contribute to the "commission or attempted commission of . . . a crime by a group of persons acting with a common criminal purpose." Section 3(d) of Article 25 Rome Statute of the International Criminal Court, July 17, 1998. For liability to attach, such contribution must be intentional and shall either: (1) Be made with the aim of furthering the criminal activity or criminal purpose of the group . . .; or (2) Be made in the **knowledge of the intention of the group** to commit the crime (emphasis added).

h. Hamdan is Not a Minor Actor and Even if He is, He can still be Convicted of Conspiracy.

Examining MCI No. 2, there is no distinction between minor and major actors with respect to the charge of conspiracy. The Accused's status is irrelevant and the Prosecution is only required to prove the elements listed.

Even if relevant, it is premature to litigate the magnitude of the Accused's role in the conspiracy or criminal enterprise. The Defense is essentially asking for a trial within a trial. The Prosecution has the burden to prove that the Accused is a conspirator or he joined an enterprise of persons who shared a common criminal purpose. MCI No. 2 para 6(C)(6). The factual evidence concerning the Accused will be presented on the merits of the case. The appropriate time to raise this issue is after the Prosecution has been given the opportunity to factually present evidence concerning the Accused's role. This issue should be raised after the presentation of the Prosecution's case when the Commission Members have already seen the evidence necessary to decide this motion.

Analysis of whether a minor actor can be prosecuted for conspiracy is unnecessary in this case as this Defense assertion fails both on factual and legal grounds. The Prosecution will present evidence that the Accused is not a minor actor, but rather is one of a handful of Usama bin Laden's most trusted confidants. He is trusted to know the travel plans of the leader of the al Qaida organization and bin Laden puts his life in the Accused's hands every time he gets into the car driven by the Accused. The Accused has the ultimate responsibility of protecting this terrorist organization's leader at all costs. Putting this in perspective, this leader the Accused is tasked to protect is the ultimate authority whose approval is required before any of these horrendous terrorist acts are commenced.

The Defense is patently aware that in order to nullify the actions of those involved in a global conspiracy or criminal enterprise, certain non leaders need to be prosecuted to bring the power brokers of the organization to justice. Civilian Defense Counsel in this case acknowledges this fact. Neal Kumar Katyal, Why it Makes Sense to Have Harsh Punishments for Conspiracy, Legal Aff., Apr. 2003, at 44 (advocating use of conspiracy prosecutions as necessary weapon against group activity and as a means to compel cooperation of minor actors). It is commonplace in mafia and drug ring prosecutions to prosecute those at a lower level in an organization and work your way up. See Richard P. Barrett and Laura E. Little, Lessons of Yugoslav Rape Trials:

A Role for Conspiracy Law in International Tribunals, 88 Minn. L. Rev. at 66. (conspiracy prosecutions are necessary and useful to combat those "small fish" on the periphery of the conspiracy but who are nonetheless essential to the conspiracy's object).

In the case of Prosecutor v. Kvocka et al., the Trial Chamber examined the criminal liability under a joint criminal enterprise theory of various individuals who either worked or visited the Omarska prison camp where acts of murder, torture and rape were being committed. Case No: IT-98-30/1, Judgment 2 November 2001. Because none of the accused in the case were organizers of the camp or in a high level position within the military, the Trial Chamber focused its attention on the participation of lower-level actors in a criminal enterprise. Id. at 289. The Trial Chamber distinguished between those who are co-perpetrators of the criminal enterprise and those who aid or abet the criminal enterprise. Id. at 282-284. One guilty as a co-perpetrator of the enterprise shares the intent to carry out the enterprise and performs an act or omission in furtherance of the enterprise, while an aider and abettor of a joint criminal enterprise need only be aware that his contribution is assisting or facilitating a crime committed by the enterprise. Id. Criminal liability exists when the "evidence indicates that a person who substantially assists the enterprise shares the goals of the enterprise." Id.

The significance of these low threshold standards that allow for the conviction of crimes such as murder and torture is that finding Mr. Hamdan guilty for his participation in this worldwide criminal enterprise where thousands have been killed will not "destabilize the development of international criminal law" as the Defense contends (noting that source of this Defense assertion is an article written by Mr. Hamdan's Civilian Defense Counsel in this case).

Based upon Defense assertions in the media concerning the Accused's role in the al Qaida organization a thorough analysis of the Kvocka case is helpful. Military Defense Counsel has asserted that the Accused went to Afghanistan in 1996 on his way to Tajikistan to engage in fighting (in fact *jihad*) against the Soviets. Carol Rosenberg, Driver for bin Laden in a Guantanamo Cell, Miami Herald, February 11, 2004. According to Military Defense Counsel he never made it to Tajikistan, but rather took a job where he ultimately worked for Usama bin Laden as his personal driver. Id. Based on prior statements given by the Accused to investigators, he concedes that he knew of bin Laden's Declaration of War on the United States and the fatwa issued by bin Laden and others calling for the killing of all Americans military or civilian. The Accused further admitted that he was aware al Qaida was responsible for the American Embassy bombings in 1998, the USS COLE bombing in 2000 and the attacks of September 11th.

In Kvocka the court provided the following example to explain the wide reach of liability based on connection to a joint criminal enterprise:

> An accountant hired to work for a film company that produces child pornography may initially manage accounts without awareness of the criminal nature of the company. Eventually, however, he comes to know that the company produces child pornography, which he knows to be illegal. If the accountant continues to work for the company despite this knowledge, he could be said to aid or abet the criminal enterprise. Even if

> it was also shown that the accountant detested child pornography, criminal liability would still attach. At some point, moreover, if the accountant continues to work at the company long enough and performs his job in a competent and efficient manner with only an occasional protest regarding the despicable goals of the company, it would be reasonable to infer that he shares the criminal intent of the enterprise and thus becomes a co-perpetrator.
>
> Kvocka Judgment at para. 284.

The Trial Chamber in Kvocka did an extensive analysis of post –World War II trials in solidifying its position on criminal enterprise liability. Id. at para 290-297. In conducting this review the Trial Chamber noted that an accused is liable if their participation made it easier and more efficient for the enterprise to commit crimes. Id at para 296, 309 (citing also that mere drivers and ordinary soldiers can be held liable based on their participation in a criminal enterprise).

The following factors were identified when evaluating criminal liability for those deemed to be lower level participants in a joint criminal enterprise:

(1) the size of the criminal enterprise;

(2) the functions performed;

(3) the position of the accused;

(4) the amount of time spent participating after acquiring knowledge of the criminality of the system;

(5) efforts made to prevent criminal activity; and

(6) the seriousness and scope of the crimes committed.

Id. at para. 311-312.

Applying these factors to the Accused:

(1) the al Qaida organization is a global criminal enterprise;

(2) the al Qaida organization is committed to killing Americans and other "infidels" and has committed heinous crimes in carrying out this goal;

(3) the Accused is responsible for transporting and ensuring the safety of the leader of the al Qaida organization and facilitates the transport of Usama bin Laden to terrorist training camps where motivational speeches are given encouraging the killing of Americans;

(4) the Accused most likely knew of the purpose of the al Qaida organization in 1996, but he surely knew prior to the 1998 Embassy Bombings when he stated "this was the first time bin Laden was directly going up against America";

(5) the Prosecution is unaware of any efforts by the Accused to thwart this activity; and

(6) the heinous crimes carried out are of an astronomical proportion.

To put this into perspective, in the Kvocka trial, an administrative assistant who worked at the prison camp for a mere 22 days was found guilty based upon his role in the joint criminal enterprise. Id. at para. 462-463, 726.

7. Attachments

a. Hamdan Form 40 of XXXX
b. Hamdan FBI 302 of XXXX
c. Hamdan FBI 302 of XXXX

Please note that these items are FOUO/Law Enforcement Sensitive and are protected information in accordance with the Presiding Officer's previously issued Protective Order of August 27, 2004.

8. Oral Argument. The Prosecution is prepared to provide oral argument on this motion on the limited issues that are ripe for resolution at this time.

XXXX
Commander, JAGC, USN
Prosecutor
Office of Military Commissions